status exists, be it total or partial, when the claimant is in the process of fully recovering from the medical consequences of his injury and is expected to return to full employment, but for this period of time suffers economic loss in the form of having no earning capacity, or a reduced one. 33 U.S.C. § 908(a)-(c), (e). Permanent partial disability benefits for injuries to particular body parts enumerated in the LHWCA, such as the injury to Castro's leg, are similarly based on a measure of the claimant's economic loss and the status of his recovery from the medical consequences of the injury. 33 U.S.C. § 908(c)(1)-(20). The statute provides a schedule rating of the body part injured and the disability awarded, once the claimant has reached maximum medical recovery, and is a function of the loss of use of the member and the claimant's wages. The schedule reflects the statute's assessment of the economic loss suffered by the claimant resulting from the injury incurred.

Similarly, the express statutory language of the LHWCA used to determine the compensation for disability arising from an injury to a non-scheduled body part, i.e., the claimant's loss of wage earning capacity, references the claimant's entitlement only during "the continuance of partial disability." 33 U.S.C. § 908(c)(21). As defined, "disability" is that economic loss caused by the injury.

Nowhere in the statute is there to be found text which alters the disability classification structure of section 908 so as to sever the required causal relationship between the "incapacity to earn wages" (economic loss) "because of injury" (its medical consequences to the claimant). The Ninth Circuit, while acknowledging that the "LHWCA does not specifically provide that total disability benefits are to be awarded where a claimant shows that participation in a

rehabilitation program precludes acceptance of alternative employment" nevertheless did sever this mandated nexus by redefining the term "because of injury" to include the claimant's voluntary decision to attend a retraining program, thereby making himself unavailable for alternative employment and wages. Pet. App. pg. 13.

That Castro had a wage earning capacity at the time he was in the vocational program is undisputed. See Pet. App. pgs. 7, 35 and 81. That he had a scheduled injury entitling him to permanent partial disability compensation benefits under the statute's schedule of ratings on reaching maximum medical improvement is also undisputed. As such he had been fully compensated for his economic loss caused by the medical consequences of his injury. Yet, without any change in his medical status or wage earning capacity he was able to obtain a disability classification of temporary total disability simply by volunteering to participate in a government approved retraining program. By taking himself out of the job market for his own purposes he was able to unilaterally manipulate his wage earning capacity to zero. The Ninth Circuit, disregarding the plain meaning of section 908, accepted these maneuverings, creating a new disability classification thereby. It defended this mistaken entitlement arguing that the LHWCA's lack of an express statutory provision preventing payment of total disability benefits to Castro in this scenario was but a statutory invitation to the courts to "enunciate standards for distinguishing between the various categories of disability total and partial as well as permanent and temporary." Pet. App. pg. 13, *citing Louisiana Insurance Guaranty Ass'n v. Abbott*, 40 F.3d 122, 125 (5th Cir. 1995). It further maintained that its new benefit entitlement promotes "[a] principal policy of the LHWCA:

the encouragement of vocational rehabilitation." Pet. App. pg. 13.

The Ninth Circuit, in grasping judicial control over the statute despite its unambiguous terms, dismissed as of no import and simply as "Congressional inaction" the extraordinarily relevant and extensive legislative history of the 1984 amendments to the LHWCA. Amici AIG and CNA refer to the thorough review of that history in Argument 111 of the brief of amicus Longshore Claims Association in support of its position that Congress has expressed its intent on the issue of whether the LHWCA should provide for the payment of total disability to a claimant during vocational rehabilitation and, moreover, whether the statute does, as presently written, provide for such payments.

In the events leading to the passage of the 1984 amendments to the LHWCA, on three separate occasions, Congress presented bills which expressly called for the payment of total disability compensation benefits during rehabilitation. These bills had been presented in direct acknowledgment that the 1972 amendments to the LHWCA did not provide such benefits and that the proposed bills would change that status. However, on the final passage of the 1984 amendments, the provision calling for total disability benefits during rehabilitation was removed and not made a part of the LHWCA which the Ninth Circuit analyzed in *Castro*. The affirmative action of Congress in removing this provision and excluding it from passage is indicative of its intent on the issue. That intent was not to permit the payment of total disability compensation benefits during a claimant's participation in retraining.

Further, Congress' actions disclose its clear understanding that without the passage of an amendment to the 1972 LHWCA, claimants under the statute were not entitled to such benefits. In that the present LHWCA, the product of the 1984 amendments, does not have such a provision, it must be the legislature's comprehension that the benefits created by the Ninth Circuit are not supported by the statute.

In addition to misreading the plain language of section 908 of the LHWCA as to the statutory structure of disability classifications and disingenuously rejecting Congress' clear expression of intent with regard to the prohibition of paying total disability compensation benefits to claimants participating in vocational retraining, the Ninth Circuit has ignored the dictates of this Court provided in the *PEPCO* case.

Castro's LHWCA claim presented itself as the typical *PEPCO* claim in that he had suffered a scheduled injury loss, had reached maximum medical improvement and had an alternative earning capacity. Under these circumstances, Castro's disability compensation benefit entitlements would be completed on the payment of his scheduled award. However, by rejecting the application of *PEPCO* to Castro's claim, the Ninth Circuit found itself free of judicial precedent sufficient to redefine Castro's disability classification and entitle him to significant and extended total disability benefits. These actions are in direct contravention of *PEPCO*.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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No. 05-371

In The

Supreme Court of the United States

GENERAL CONSTRUCTION COMPANY and LIBERTY NORTHWEST INSURANCE CORP.,

Petitioners,

v.

ROBERT CASTRO and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF LONGSHORE CLAIMS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF *AMICUS CURIAE*[1]

The Longshore Claims Association ("LCA") is a nonprofit national association made up of longshore employers, insurance carriers, claims professionals, risk managers, and attorneys dedicated to the proper administration of various federal workers' compensation acts including the Longshore and Harbor Workers' Compensation Act, the Jones Act, and general maritime laws. Established in 1989, the LCA's goals are: to promote claims administration expertise through educational programs, to promote cooperation with the respective authorities under all applicable acts, and to facilitate the fair handling of claims. Members of the LCA are involved in the day-to-day administration of employee injury claims covered by the Longshore and Harbor Workers' Compensation Act[2] (hereinafter the "LHWCA" or the "Act"). They have a compelling interest in the outcome of this case, especially as it affects the rights and liabilities of the employer and employee in regards to vocational rehabilitation.

The issues set forth *General Construction v. Castro*[3] are important to *amicus curiae* because the Ninth Circuit's ruling significantly increases the costs of longshore claims by requiring employers to continue total disability payments in cases where the claimant is capable of working, where work has been found to be available to the claimant, but where the claimant nonetheless chooses not to work because of his or her participation in vocational rehabilitation. We respectfully submit that the LCA's research and collective expertise provide valuable insight on the issue of

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[1] All parties have consented to the filing of this brief. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than *amicus* and its counsel, made a monetary contribution to this brief's preparation and submission.

[2] 33 U.S.C. §§ 901, *et seq.*

[3] See *General Construction v. Castro*, 401 F.3d 963 (9th Cir. 2005) reprinted in Petition for Writ of Certiorari Appendix ("Pet. App.") pages 1-31.

a claimant's entitlement to temporary total disability compensation while undergoing vocational rehabilitation under the Act.

STATEMENT OF THE CASE

This case arises out of a work-related injury that is covered by the LHWCA. The LHWCA provides a road map for how disabilities are to be compensated under the Act. The Ninth Circuit, relying on opinions from the Fourth and Fifth Circuits, have created a significant detour in that roadmap that requires employers to travel an extra distance at considerably more expense.

The LHWCA provides for temporary total or temporary partial disability payments until a claimant reaches maximum medical improvement.[4] After the injury becomes "permanent," a claimant may be eligible for permanent disability. If a claimant's injury is "scheduled," he or she receives a set payment under the schedule. Pet. App. 91-93. If a claimant's injury is "unscheduled" he or she receives continued disability payments proportionate to his or her wage-earning capacity. Pet. App. 94. In the rare instance that a claimant is found to be totally disabled because of an inability to perform any kind of work, he or she receives permanent total disability.

Robert Castro suffered a scheduled injury under Section 8(c)(2) of the LHWCA. Pet. App. 66. Mr. Castro received temporary total disability payments plus medical expenses from the date of his injury in November 20, 1998 (Pet. App. 65), until August 13, 2000, the day before he reached maximum medical improvement. Pet. App. 68 and

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[4] "Maximum medical improvement" is a term used by the courts and the Benefits Review Board to identify "the point when the injury has healed to the full extent possible." See *Louisiana Insurance Guaranty Association v. Abbott*, 40 F.3d 122, 126 (5th Cir. 1994) (internal citations omitted). A claimant is entitled to temporary disability payments until he or she has reached maximum medical improvement. *Id.*

87. At that point, Mr. Castro was paid 48.96 weeks under the schedule. Pet. App. 79 and 87. This should have been the end of the employer's liability. Almost a year later after Mr. Castro's knee injury, the Department of Labor determined that Mr. Castro was a candidate for vocational training,[5] and he was enrolled in a two-year hotel management program. Pet. App. 74. Mr. Castro sought additional total disability payments through the completion of the program. Pet. App. 64.

On June 20, 2001 an Administrative Law Judge ("ALJ") held that pursuant to the Fifth Circuit's decision in *Louisiana Insurance Guaranty Ass'n v. Abbott*,[6] a claimant was entitled to temporary total disability compensation during vocational rehabilitation provided that the finder of fact weighed several factors: whether the employer had agreed to the rehabilitation plan, whether the claimant's enrollment in the program precluded employment, whether completion of the program would increase the claimant's wage-earning capacity, and whether claimant was diligent in completing the program. Pet. App. 81-82. Applying this analysis to Mr. Castro's

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[5] There has been no discussion as to why Mr. Castro did not seek vocational rehabilitation sooner, 20 C.F.R. § 702.502 states that "[a]ll injury cases which are likely to result in, or have resulted in, permanent disability, and which are of a character likely to require review by a vocational rehabilitation advisor or the staff of the Director, shall promptly be referred to such adviser by the district director or his designee having charge of the case." The Fifth Circuit in *Louisiana Insurance Guaranty Association v. Abbott* stated that "[o]nce an injury becomes permanent, an employee becomes eligible for federally-sponsored vocational rehabilitation programs." (40 F.3d 122, 126.) In fact, claimants may seek a finding from the district director on the likelihood of permanent disability, and request a referral to vocational rehabilitation, before their injuries reach maximum medical improvement. In cases where permanent disability is found "likely" the district director may then refer claimants to a vocational rehabilitation adviser while they are still receiving temporary total disability payments properly due to them under 33 U.S.C. § 908(b).

[6] 40 F.3d 122 (5th Cir. 1994)

case, the ALJ held that Mr. Castro was entitled to temporary total disability during vocational rehabilitation. Pet. App. 83-84.

The Benefits Review Board (hereinafter the "Board") affirmed the ALJ's decision. The Board also found *Abbott* to be controlling, and noted that the recent decision of the Fourth Circuit in *Newport News Shipbuilding & Dry Dock Co. v. Dir., OWCP* (*Brickhouse*), was further precedent.[7] Pet. App. 50. The Board acknowledged that the Act did not specifically provide for total disability benefits during vocational rehabilitation and that "Congress had considered and rejected the awards of total disability benefits to employees enrolled in vocational rehabilitation programs as a matter of statutory right." Pet. App. 43. The Board rationalized its ruling by stating that *Abbott* did not create a new type of benefit, but merely added one more factor for the administrative law judge to consider when addressing the issue of availability of suitable alternate employment.[8] Pet. App. 45.

The Ninth Circuit denied petition for review. Pet. App. 31. In its opinion, the Ninth Circuit states that *Abbott* and *Newport News* have "added another element to this basic test for distinguishing between total and partial disability." Pet. App. 11. The Ninth Circuit confirmed this extra "element" and set forth an entirely new set of circumstances

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[7] 315 F.3d 286 (4th Cir. 2002)

[8] The Board was following the analysis in *Abbott* in which the Fifth Circuit, citing *New Orleans* (*Gulfwide*) *Stevedores v. Turner*, 661 F.2d 1031, 1038 (1981), had applied a two-pronged test by which employers can satisfy its burden of showing suitable alternate employment. 40 F.3d at 127. Pursuant to *Turner* the courts should consider (1) what types of jobs the claimant is capable of performing or capable of being trained to do, and (2) whether there are jobs reasonably available in the community for which the claimant is able to compete and which he could realistically secure. *Id.* Applying this analysis, *Abbott* decided that a claimant who is participating in vocational rehabilitation is "unavailable" even for otherwise suitable and available employment. 40 F.3d at 127-28.

under which claimants will be entitled to total disability. Pursuant to the Ninth Circuit's holding, a claimant is now also totally disabled if he or she is capable of working, if work is available, but where claimant chooses not to work because of his or her participation in vocational rehabilitation.

SUMMARY OF THE ARGUMENT

Amicus curiae respectfully submits that:

(1) The plain language of the Act does not support the payment of temporary total disability during vocational rehabilitation;

(2) The Ninth Circuit's opinion conflicts with two important goals of the Act: returning claimants back to work quickly and maintaining the "fragile balance between labor and business."

(3) Congress affirmatively excluded language from the LHWCA that would have provided for temporary total disability payments during vocational rehabilitation; and

(4) The "case-by-case" analysis required by the Ninth Circuit before a claimant is awarded total disability during vocational rehabilitation does not distinguish those benefits from the benefits Congress purposefully excluded from the Act.

ARGUMENT

I. The Plain Language Of The LHWCA Does Not Allow For Temporary Total Disability Benefits To Be Paid While Claimant Undergoes Vocational Rehabilitation

In order to create its detour, the Ninth Circuit has resorted to twists and hairpin turns in its analysis. Nothing in the plain language of the Act supports the Ninth Circuit's holding that participation in vocational rehabilitation

renders a claimant totally disabled. The Ninth Circuit has created this detour by relying on the following premises: (1) the statute is generally silent on the scope and definition of "total disability" (addressed below); (2) providing total disability benefits to claimants during vocational rehabilitation is consistent with "a principal policy of the LHWCA" (addressed in Section II, below); (3) the legislative history of the LHWCA is dismissible because it can be characterized as "congressional inaction" (addressed in Section III, below); (4) the entitlement created by *Abbott* is distinguishable from the entitlement omitted by Congress, because *Abbott* requires the fact-finder to consider each case separately (addressed in Section IV, below); and (5) the entitlement for total disability for scheduled injuries is consistent with *Potomac Elec. Power Co. v. Dir., OWCP (PEPCO)*[9] (addressed by Petitioners). Pet. App. 13-15.

The roadmap for determining disabilities under the LHWCA is clear and complete. The LHWCA recognizes four classifications of disability: (1) permanent total (App. 106), (2) temporary total (App. 107), (3) permanent partial (Pet. App. 91-94); and (4) temporary partial (App. 108). Permanent partial disabilities are divided into two types, "scheduled" and "unscheduled." Pet. App. 91-94. If a claimant's injury falls into one of the categories enumerated in the Section 8(c)(1)-(13) of the LHWCA, it is a "scheduled injury," and permanent partial disability is paid according to the terms of the schedule. Pet. App. 91-93. In all other cases, the injury is "unscheduled," and permanent partial disability is calculated based on an employee's wage-earning capacity. Pet. App. 94.

The LHWCA defines "disability" as the "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." (App. 104) Total disability may occur as a result of either scheduled or unscheduled injuries where

[9] 449 U.S. 268 (1980).

claimant retains no wage-earning capacity. A disability is classified as "total" when there is no suitable alternative employment available.[10] In other words, where the claimant has retained no "wage earning capacity."

The LHWCA states that "wage-earning capacity" for purposes of a partial disability is determined by a claimant's "actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity." Pet. App. 95. If a claimant is not working or his actual earnings do not fairly represent his capacity then the wage-earning capacity may be fixed. *Id.* However the deputy commissioner must have "due regard" for "the nature of the injury, the degree of physical impairment, his usual employment, and any other factor that may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future." *Id.* In the statute, the phrase "any other factor" is modified by "that may affect his capacity to earn wages in his disabled condition," and the "effect of the disability into the future." *Id.* "Wage-earning capacity" is therefore affected by "disability" and "disability" is the "incapacity because of injury."[11]

Instead of following this roadmap, the Ninth Circuit, relying on *Abbott* and *Newport News* has inappropriately redefined "disability" under the LHWCA. Under the Ninth Circuit's ruling, the definition of "disability" is the "incapacity because of injury *or participation in ALJ approved vocational rehabilitation,* to earn wages . . . " The Ninth Circuit defends this definition by stating that under the LHWCA "disability" is understood in economic terms, and

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[10] See also footnote 8, above.

[11] After Mr. Castro reached maximum medical improvement, the Administrative Law Judge made a factual finding that Mr. Castro retained wage-earning capacity. Pet. App. 81. The Benefits Review Board (Pet. App. 35), and the court of appeals (Pet. App. 7) upheld this finding.